IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No.: DA-09-0510

STATE OF MONTANA, EX REL. DEPARTMENT OF ENVIRONMENTAL QUALITY,

Plaintiff/Appellant and Cross-Appellee,

v.

BNSF RAILWAY COMPANY,

Defendant/Appellee and Cross-Appellant.

ANSWER BRIEF AND CROSS-APPEAL

On Appeal from the First Judicial District Court, Lewis and Clark County
The Honorable Jeffrey M. Sherlock, Presiding
District Court Cause No. BDV 2004-596

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STATEMENT OF THE CASE

The Montana Department of Environmental Quality ("DEQ") brought suit under the Comprehensive Environmental Cleanup and Responsibility Act, MONT. CODE ANN. §§ 75-10-701 *et seq.* ("CECRA"), seeking to compel seven defendants, including BNSF Railway Company ("BNSF"), to abate contamination at three adjacent former industrial sites (collectively the "KRY site") in Flathead County, Montana. Dkt. #1, ¶6.[1]

DEQ eventually entered into consent decrees with all of the defendants except BNSF. These consent decrees allowed those responsible parties to settle DEQ's claims and receive contribution protection from other potentially responsible parties in exchange for little to no consideration.

DEQ pressed its suit against BNSF, advancing both its CECRA claim and a public nuisance claim. Prior to trial, the District Court granted DEQ's motion for partial summary judgment holding BNSF jointly and severally liable under CECRA for abatement of one of the industrial facilities, the operations of Kalispell Pole & Timber Company (KPTCo), because BNSF owned some of the property on which KPTCo operated. Dkt. #416, pp. 15, 27, ¶3. The District Court then held an eight-day bench trial March 13-24, 2008, on a second industrial site, the Reliance

[1] Citations to "Dkt. [#]" direct the Court to the District Court's Case Register Docket with corresponding numbered documents.

Refinery ("Reliance") site.[2] Following the trial, the District Court issued Findings of Fact and Conclusions of Law ("FF&CL") holding BNSF jointly and severally liable for the contamination at Reliance as an "owner," "operator," and "arranger" under CECRA, MONT. CODE ANN. § 75-10-715(1)(b) & (c), although BNSF only owned a small railroad right of way that was used to deliver petroleum to and from the refinery. Dkt. #588, pp. 22-22.

Subsequently, the District Court entered its Final Unified Abatement Order, compelling BNSF to abate the contamination at the KPT and Reliance sites. Dkt. #614, pp. 2-3, ¶¶1, 3. The District Court declined to order that BNSF's abatement be controlled by the Record of Decision ("ROD") issued by DEQ, as the ROD was issued *subsequent* to trial, was never considered by the District Court, and is the subject of a separate judicial proceeding. *Id.*, p. 3, ¶3.

Despite obtaining the very relief it sought from the District Court—an order of abatement and a holding that BNSF was jointly and severally liable for that abatement—DEQ filed the instant appeal. In response, BNSF filed its cross-appeal.

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[2] The District Court made no findings of fact or conclusions of law with regard to the Yale site, and no issues related to the Yale site are before this Court.

STATEMENT OF ISSUES ON APPEAL

I. The District Court correctly refused to compel compliance with the ROD issued by DEQ after trial, because the ROD was not considered by the District Court and is the subject of separate judicial proceedings.

II. Because the District Court found against BNSF on its apportionment defense, DEQ's appeal regarding the availability of apportionment as a defense under CECRA should be dismissed as seeking an improper advisory opinion. Alternatively, the District Court correctly held that apportionment is a defense under CERCA.

III. The District Court correctly held against DEQ's nuisance claim, both because DEQ failed to seek restoration damages in its pleadings and on the merits.

IV. The District Court did not abuse its discretion by allowing Pat Keim—who has spent a lifetime working on railroads—to testify as an expert.

STANDARD OF REVIEW ON APPEAL

First, DEQ has not challenged the District Court's entry of the Final Unified Abatement Order, but has instead challenged the structure of that order. The District Court's entry and fashioning of an abatement order under CECRA, MONT. CODE ANN. § 75-10-711(8), was equitable relief. The District Court enjoys broad discretion in structuring equitable relief with all necessary factual determinations reviewed for clear error and legal questions reviewed "to determine whether those

conclusions are correct." *LeFeber v. Johnson*, 2009 MT 188, ¶19, 351 Mont. 75, 209 P.3d 254; MONT. CODE ANN. 3-2-204(5).

Second, although the issue is not justiciable on appeal, whether apportionment is available as an affirmative defense to CECRA is a question of law, reviewed without deference to determine whether the conclusion is correct. *LeFeber* at ¶19.

Third, DEQ's appeal of the District Court's rejection of its nuisance claim raises a mixed question of law and fact. Fact findings are reviewed for clear error to determine "if it is not supported by substantial credible evidence, if the trial court misapprehended the effect of the evidence, or if [this Court's] review of the record convinces [it] that a mistake has been committed." *Id.* at ¶18. The Court will "review a district court's conclusions of law to determine whether those conclusions are correct." *Id.* at ¶19.

Fourth, the District Court decision to receive Pat Keim's expert testimony is reviewed for abuse of discretion. *Tin Cup County Water and/or Sewer Dist. v. Garden City Plumbing & Heating, Inc.*, 2008 MT 434, ¶ 46, 347 Mont. 468, 200 P.3d 60.

STATEMENT OF RELEVANT FACTS

The KRY facility is made up of three different sites: the KPT site, a former wood treatment plant; the Reliance site, a former crude oil refinery; and the Yale site, a former crude oil refinery and bulk refined petroleum storage site. DEQ's Opening Brief ("DEQ Br."), p. 3. The contaminants of concern ("COC") include PCP, dioxin, and furan (a wood preservative and its by-products) and petroleum products. Dkt. #6, ¶¶ 15, 17; Dkt. #445, ¶24.

The KPT property historically encompassed approximately 35 acres and was used for pole de-barking, timber milling, and pole treatment from approximately 1947 to 1990. Dkt. #6, Amended Complaint, ¶¶ 14-15. Tracts 3B and 5A of the KPT site were owned by BNSF. Dkt. #588, p. 5, ¶25. The BNSF property was leased to KPTCo from 1945 through 1990. *Id.;* Dkt. #445, p. 8, ¶¶4-6. KPTCo used the property to operate a pole treatment facility and store the poles. *Id.;* Dkt. #445, p. 8, ¶¶4-6; Dkt. #517.5, Ex. 1, p. 2. KPTCo also owned and used adjacent property which it sold to Montana Mokko, Inc. ("Mokko") and Swank Enterprises ("Swank") in 1990. Dkt. #416, p. 5. KPTCo's operations resulted in the contamination of groundwater and soils with PCP, wood treating oil, dioxins, and furans. Dkt. #445, ¶¶14, 15, 18, 22, 24. After KPTCo ceased its operations, BNSF leased portions of its property to Klingler Lumber and Mokko. Dkt. #416, p. 5. Mokko operated a finger-joining facility on the property it acquired from

KPTCo and a sawmill on property it leased from BNSF. Dkt. #416, p. 5. Robert Parmenter ("Parmenter"), a shareholder of both Stillwater Forest Products, Inc. ("Stillwater") and Mokko, was an owner of property in the same area which he transferred to Stillwater. *Id.,* pp. 4, 8. Buried sawdust has been identified in the area of Mokko's property and DEQ has proposed its removal at an estimated cost of $1.5 million because, DEQ believes, that excavation of the "sawdust will decrease the high concentrations of metals in the groundwater over time." TR p. 130 (Plaintiff's Exhibit 20, Proposed Plan, pp. 9, 30). DEQ's 2005 inspection of the Stillwater property revealed "drums potentially containing petroleum based substances on the property that were in various states of repair" and subsequent soil sampling showed petroleum contamination in this area. Dkt. #416, p. 9. Dioxins and furans were found in surface soils of both the Stillwater and the Mokko properties. *Id.*

The Reliance property is located immediately west of the KPT property. Dkt. #6, ¶17. The Reliance site was used from approximately the 1920s through 1963 for petroleum refining and cracking operations. Dkt. #588, p. 3, ¶5. The Reliance Refining Company owned a portion of the Reliance site from 1924 through 1930 and operated a refinery on the site refining crude oil into gasoline, kerosene, various grades of distillates, gas oil (diesel), and light and heavy fuel oils. Dkt. #588, p. 3, ¶¶6-7.

In approximately 1933 the State of Montana ("DNRC") acquired Tract 30V. Dkt. #416, p. 5; Dkt. #588, p. 3, ¶3(o). A 100-foot wide railroad right of way, currently owned by BNSF, adjoins the east side of Tract 30V and a 16 foot railroad right of way, currently owned by BNSF, separates Tract 30V from Tracts 19, 19A, 19B, 30I, and 30Z. Dkt. #588, p. 3, ¶3(m)-(n). From 1933 through 1963 DNRC leased the Reliance site to various lessees engaged in refining crude oil into petroleum products. Dkt. #588, p. 4, ¶¶8-9. From 1969 through at least 1990, DNRC leased Tract 30V to KPTCo for the storage of treated and untreated poles. *Id.* at ¶10. KPTCo would transport the poles from the property it leased from BNSF's predecessor to the property it leased from DNRC. *Id.*, p. 7, ¶¶30-31. The poles would drip PCP and oil as they were being transported and would continue to drip as they were stored on Reliance – BNSF was not involved in the transport of these treated poles. *Id.*

It is undisputed that any petroleum beneath the ground and in the ground water at the Reliance site "is mostly from the refining operation." Dkt. #588, p. 18, ¶73. PCP, dioxins, and furans have also been detected in soils and groundwater at Reliance. Dkt. #588, p. 7, ¶31.

BNSF and its predecessor companies provided transportation for crude oil to and refined oil from the Reliance site. Dkt. #588, p. 9, ¶37. The District Court found that BNSF and its predecessor companies' train crews would position (i.e.

"spot") railcars to certain locations on the tracks where the shipper directed them to be placed. *Id.*, p. 4, ¶18; pp. 12-13, ¶53. In some cases the shipper directed that railcars be placed near the "Y area" where a BNSF spur line meets the BNSF main line at the Reliance site. Dkt. #588, p. 21, ¶10; *see also* pp. 9-11, ¶¶40-43, 50. Once railcars were spotted to the "Y" area, it was the responsibility of Reliance Refinery employees to unload the products from the railcars, and they would sometimes empty the products into earthen-diked pools for storage. *Id.*, p. 21, ¶12; *see also* p. 9, ¶10. The emptying of these products was done by Refinery employees, not BNSF. *Id.*, pp. 12-13, ¶53. The District Court found evidence that on two occasions leaking railcars were delivered to the Refinery. *Id.*, p. 9, ¶¶38, 39.

DEQ entered into consent decrees with the defendants other than BNSF and two non-party PLPs. The trial court approved the consent decrees. Dkt. #542, ¶19. As an owner of the Reliance site, DNRC was apportioned liability for only 27% of future clean-up costs. Dkt. #94, ¶20. Swank was apportioned 2.5%. For KPT, KPTCo, Stillwater, Mokko, and Parmenter were apportioned 0%. Dkt. #505, 506. These parties were also given contribution protection by DEQ, insulating them from BNSF's cross-claims or any future action to recover clean-up costs. Dkt. #94, 505, 506. BNSF was found to be jointly and several liability for the entirety of the clean-up at both Reliance and KPT.

SUMMARY OF ARGUMENT IN RESPONSE

DEQ obtained exactly the relief that it sought from the District Court. On appeal, however, DEQ complains about the form of the relief, arguing that the District Court erred by failing to incorporate the ROD, issued post-trial, into the Final Unified Abatement Order. DEQ's argument fails for four distinct reasons: (1) CECRA does not mandate that the District Court's abatement order be controlled by a DEQ-issued ROD—instead the District Court enjoys broad discretion to fashion an abatement order consistent with the principles of equity; (2) DEQ's Amended Complaint did not seek to compel compliance with the ROD and DEQ is not entitled to relief it did not plead; (3) the ROD issued after trial and after the close of discovery, and is currently under review in a separate judicial proceeding, such that DEQ is attempting to make an improper end-run around that proceeding; and (4) the District Court correctly recognized that BNSF has already commenced substantial abatement work on the KPT site and stands ready, willing and able to abate contamination at the Reliance site[3], and correctly exercised its discretion to allow that work to go forward.

Second, DEQ prevailed against BNSF's defense of apportionment. As such the issue is moot and not justiciable on appeal. In the alternative, if the Court

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[3] Although DEQ initially challenged the District Court's Finding of Fact confirming BNSF's willingness to conduct the abatement (Dkt. #617), it abandoned that issue in its opening brief. *See* DEQ Br., p. 2, n.1.

elects to reach this moot issue, apportionment is an available affirmative defense under CECRA when that statute is read as a whole.

Third, DEQ's appeal of the District Court's denial of its public nuisance claim fails because: (1) the only purpose of DEQ's appeal is to seek restoration damages, DEQ's Amended Complaint failed to request damages, and DEQ disavowed an intent to seek damages beyond the relief available under CECRA; (2) DEQ failed to carry its burden of showing all of the elements of a public nuisance; and (3) DEQ is improperly attempting to expand the tort of nuisance far beyond its statutory boundaries.

Finally, although also not a proper issue for appeal by the prevailing party, the District Court did not abuse its broad discretion by admitting the expert testimony of Pat Keim, because Mr. Keim is a life-long railroad worker who has observed railroad car loading practices for decades, including in Montana.

ARGUMENT IN RESPONSE

I. The District Court Correctly Refused to Compel Compliance With the ROD.

Despite requesting the District Court address **how** t he abatement of the contamination at the KPT and Reliance sites must take place, DEQ has apparently changed its mind and now complains on appeal that the District Court exceeded its discretion by responding to DEQ's request.

In DEQ's Motion for Final Unified Abatement Order (Dkt. #589, 590), DEQ did not just ask the District Court to combine its two prior orders for KPT and Reliance. Instead, DEQ's improper objectives were (1) to prevent BNSF from having the opportunity to abate the contamination at the KPT and Reliance sites, contrary to the District Court's prior orders; and (2) to make an end run around BNSF's separate challenge of the ROD by obtaining judicial approval of the ROD without any court undertaking any substantive or technical review. In essence, DEQ seeks the power to unilaterally dictate how a cleanup should take place, without regard to efficiency and effectiveness, and without any obligation to respond to a responsible party's serious technical concerns about the feasibility of the methods selected.

The District Court was within its broad equitable powers in fashioning the Final Unified Abatement Order. Its ruling should be affirmed.

A. The District Court Properly Exercised Its Equitable Powers Consistent With the Plain Language of CECRA.

CECRA does not direct a district court to order abatement consistent with a ROD issued by DEQ—instead, it invokes the courts' broad powers to grant "equitable relief" by ordering a party to "abate" contamination. *See* MONT. CODE ANN. § 75-10-711. Where a statute invokes a court's equitable powers, the court has discretion to fashion a remedy within ordinary principles of equity, and it is "not bound by castiron rules." *Dutton v. Rocky Mountain Phosphates*, 151 Mont.

54, 74, 438 P.2d 674 (1968); *see also Kellogg v. Dearboard Information Services, LLC*, 2005 MT 188, ¶12, 328 Mont. 83, 119 P.3d 20. Rather, the rules "are flexible and adapt themselves to the exigencies of the particular case." *Id.* Courts acting in equity "have discretion unless a statute clearly provides otherwise." *U.S. v. Oakland Cannibis Buyers' Co-op*, 532 U.S. 483, 496 (2001). This discretion is displaced "only by a clear and valid legislative command." *Id.*

The CECRA section authorizing DEQ to bring an action for abatement "instead of" following an administrative process for cleanup does **not** limit a district court's discretion, but rather is silent on the form of equitable relief that a court has discretion to mandate:

> Instead of issuing a notification or an order under this section, the department [DEQ] may bring an action for legal or **equitable relief** in the district court of the county where the release or threatened release occurred or in the first judicial district **as may be necessary to abate** any imminent and substantial endangerment to the public health, safety, or welfare or the environment resulting from the release or threatened release.
>
> MONT. CODE ANN. § 5-10-711(8) (emphasis added).

Nowhere does this section confine a district court's equitable powers by requiring that relief incorporate a cleanup decision subsequently issued by DEQ. It indicates only that the court should order the defendant(s) to facilitate abatement of the imminent and substantial endangerment caused by the contamination.

Nor does any other section of CECRA obligate a court to conform its order of abatement to a ROD issued by DEQ. Contrary to DEQ's contention (DEQ Br., p. 15-16), MONT. CODE ANN. § 75-10-721 does not grant it unlimited, unreviewable authority to dictate how abatement should take place, but merely outlines what DEQ must consider when approving or carrying out remedial actions under CECRA's **administrative process or voluntary cleanup.** Nowhere does MONT. CODE ANN. § 75-10-721 reference to MONT. CODE ANN. § 75-10-711(8) (the CERCA provision authorizing DEQ to seek equitable relief in court as an alternative to the administrative process). The decision of how to structure an abatement order obtained via CECRA's judicial (as distinct from administrative) process is for the trial court, not DEQ.

In the absence of any statutory language in CECRA limiting its discretion or compelling it to adopt the ROD, the District Court properly exercised its equitable power to fashion an appropriate abatement order.

B. DEQ Failed to Request Specific Performance in Its Complaint, and the ROD Was Issued After Trial.

In its Amended Complaint, DEQ broadly sought "an order requiring the Defendants to abate the endangerment to the public health, safety and welfare and to the environment under ["CECRA"][.]" Dkt. 6, p. 2, ¶1. DEQ's first claim was titled "Abatement Under CECRA," and asked for an order "requiring Defendants, and each of them, to abate the imminent and substantial endangerment to the

public health, safety or welfare to the environment resulting from the above-described releases or threatened release of hazardous or deleterious substances from the KPT, RELIANCE and YALE facilities." *Id.*, ¶27. In its prayer for relief, DEQ requested "[A]n **order of abatement** under CECRA, including MONT. CODE ANN. § 75-10-711(8)." *Id.* p. 10, ¶1 (emphasis added). Nowhere did DEQ even reference the yet-to-be-developed ROD or MONT. CODE ANN. § 75-10-721. Nor did DEQ seek equitable relief or specific performance in accordance with DEQ's (then unannounced) version of how cleanup should occur.

A party cannot recover beyond the case stated in its complaint unless the parties have explicitly or implicitly agreed to such recovery. *See* M.R.CIV.P. 8(a), 15(b); *Gallatin Trust and Sav. Bank v. Darrah*, 152 Mont. 256, 261, 448 P.2d 734, 737 (1968). Had DEQ specifically requested that abatement be conducted only pursuant to DEQ's instructions, the District Court would have had occasion to hear and review evidence on the ROD. DEQ failed to seek this relief.

Consistent with DEQ's request for relief and the plain language of MONT. CODE ANN. § 5-10-711(8), the District Court's prior orders on KPT and Reliance ordered that BNSF "abate" the contamination, giving BNSF the option of allowing DEQ to conduct the abatement if it so chose. Dkt. #588, p. 27, ¶3 ("[T]he Court ORDERS, ADJUDGES, AND DECREES that BNSF can either abate the imminent and substantial endangerment . . . or it may allow [DEQ] to conduct its

own remediation[.]"); *see* Dkt. #416, p. 27, ¶3. The District Court's Final Unified Abatement Order combines these prior orders consistent with DEQ's request for relief and CECRA. Dkt. #614, p. 2, ¶1.

It would have been improper for the District Court to mandate compliance with the ROD when it did not evaluate the ROD and DEQ did not plead for such relief. Instead, the abatement orders were entirely consistent with CECRA's judicial process and the relief DEQ actually requested.

C. The District Court Correctly Rejected DEQ's Attempt to Obtain "Backdoor" Judicial Approval of the ROD.

After the ROD's issuance but prior to the Court's unified order, BNSF challenged the ROD in a separate action, raising serious technical concerns about the feasibility and efficiency of its cleanup methods (*see* Dkt. #593, Ex. 7). Against this backdrop, DEQ was effectively asking the District Court to grant judicial approval of the ROD without conducting any substantive review—thereby preempting and defeating BNSF's separate challenge to the ROD. The District Court was well within its discretion to decline DEQ's request and to instead award DEQ only the relief it sought in its Complaint—an order of abatement under MONT. CODE ANN. § 5-10-711(8).

BNSF's ROD challenge is not an effort to delay or prevent cleanup. On the contrary, as BNSF represented to the District Court, BNSF has significant technical, practical and fiscal concerns about certain elements of the ROD, and has

instead advocated for a remedy that would clean up the site decades earlier at a lower cost. *See* Dkt. #593, Ex. 6, 9. Rather than offering any response to BNSF's very real but as-yet unadjudicated concerns, DEQ instead asserts unilateral authority to impose whatever form of abatement it sees fit—without regard to technical accuracy, efficiency or cost, and without regard to effectiveness in ultimately cleaning up the site (each procedural safeguards imposed by statute). The District Court was correct to recognize that BNSF should be afforded the opportunity to present evidence supporting its concerns with the ROD to a court of competent jurisdiction, and that such court should weigh that evidence to determine whether DEQ acted arbitrarily and capriciously. Dkt. #614 at 3, ¶3.

D. The District Court Properly Recognized that BNSF Continues to Abate Contamination at the KPT Site.

As the District Court correctly recognized, "BNSF has been abating the contamination at KPT, both before and during this litigation, and has stated its intent to complete such abatement at that site. BNSF has also stated its willingness, ability, and plans to abate contamination at Reliance." Dkt. #614 p. 2, ¶2. Indeed, contrary to DEQ's contention that BNSF is stalling implementation of cleanup, BNSF has been conducting remediation at the KPT Site for more than 9 years and has spent nearly $3 million for this work. *See* Dkt. #593, p. 4. BNSF has repeatedly indicated its willingness both to continue remediation work at KPT and implement remediation work at Reliance. *Id.* That these proposals did not

conform exactly to DEQ's ROD does not in any way indicate an unwillingness to abate contamination at the site. *Id.*, p. 10.

BNSF already has extensive experience conducting cleanup work at the KPT site, and will continue that cleanup during the pendency of its challenge to the ROD. *See* Dkt. #593, pp. 3-7. Hence, the Final Unified Abatement Order was within the District Court's equitable discretion.

II. Although the Issue is Moot in This Case and Should Not Be Reached, Apportionment is Available Under CECRA.

A. Because the District Court Ruled Against BNSF on Its Apportionment Defense, DEQ's Appeal on This Issue is Moot.

In the District Court, DEQ prevailed against BNSF's attempt to establish apportionment under CECRA. Dkt. #588, p. 25, ¶¶26-28. Nonetheless, DEQ appeals this result, arguing that it should have prevailed against apportionment as a matter of law rather than as an evidentiary matter. In appealing the **basis** for its victory rather than the actual **result** reached by the District Court, DEQ raises a moot issue and seeks an improper advisory opinion.

The judicial power of Montana's courts, like their federal counterparts, is limited to "justiciable controversies." *See Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, ¶6, 355 Mont. 142, 226 P.3d 567 . A "justiciable controversy is one upon which a court's judgment will effectively operate, as distinguished from a dispute invoking a purely political, administrative,

philosophical or academic conclusion." *Clark v. Roosevelt County*, 2007 MT 44, ¶11, 336 Mont. 118, 154 P.3d 48. Where, as here, a court's judgment on an issue "will not effectively operate to grant relief, the matter is moot. . . . Lacking the provision of any relief, a decision on the merits of the issue raised would be merely advisory." *Id.* This Court has long and consistently held that it "does not render advisory opinions" and that it "lacks jurisdiction to decide moot issues or to give advisory opinions insofar as an actual 'case or controversy' does not exist." *Plan Helena*, ¶¶9, 11 (compiling cases).

Federal precedent is "persuasive authority for interpreting the justiciability requirements of Article VII, Section 4(1) [of the Montana Constitution.]" *Id. Id.* at ¶6. The federal courts have repeatedly explained that they "review judgments, not statements in opinions," and that interlocutory orders merge into the final judgment. *California v. Rooney*, 483 U.S. 307, 311, 107 S.Ct. 2852 (1987) (internal quotation omitted). Applying this general principle, the Ninth Circuit has found that it lacked jurisdiction over an appeal "because the appellants won the case below. . . . **They lost on the issue which they want us to review, but the decision on that issue has no effect on them.**" *United States v. Good Samaritan Church*, 29 F.3d 487, 488 (9th Cir. 1994) (emphasis added). Similarly, applying the concept of mootness, the Ninth Circuit has explained that "[a] party who receives all that he has sought generally is not aggrieved by the judgment affording

the relief and cannot appeal from it." *Envtl. Prot. Info. Center, Inc. v. Pacific Lumber,* 257 F.3d 1071, 1075 (9th Cir. 2001). *See also Concerned Citizens of Cohocton Valley v. New York State Dept. of Envtl. Conservation*, 127 F.3d 201, 204 (2d Cir. 1997) ("Thus, if a court grants the ultimate relief a party requested, even though on grounds other than those urged by the prevailing party, that party is generally not 'aggrieved' by the judgment and may not appeal.").

The District Court held against BNSF and in favor of DEQ on BNSF's defense of apportionment, meaning that DEQ is not "aggrieved" by the judgment on that issue. Pursuant to Montana and federal precedents, DEQ's appeal of its **victory** on the apportionment issue is moot, and seeks an improper advisory opinion.

B. Under CECRA, Apportionment is Available As an Alternative to Strict Joint and Several Liability.

Alternatively, if the Court reaches this moot issue, the District Court's conclusion that apportionment is available under CECRA (Dkt. #588, ¶15) should be affirmed for three distinct reasons. First, DEQ's proposed reading of the statute departs from settled principles of statutory construction that require a reading of the pertinent statutory section in conjunction with the broader act to give effect to all provisions within. Second, the strict prohibition against apportionment that DEQ urges be applied against BNSF is at odds with DEQ's own apportionment of liability among the settling PLPs via consent decrees. Third, public policy is not

served by allowing DEQ selectively to determine and allocate liability, thereby relieving select or favored PLPs from their duty to pay their share (and insulating them from claims of contribution) while simultaneously seeking to collect from a solvent PLP that caused little of the claimed harm.

1. Principles of Statutory Construction Support the Holding of the District Court.

Although CECRA initially assumes joint and several liability under MONT. CODE ANN. § 75-10-715(1)(a)-(d), the other provisions in Chapter 75 demonstrate that apportionment is available to PLPs. The interpretation urged by DEQ requires this Court to disregard remaining sections of CECRA which make clear the legislative intent that liability may be allocated by and between PLPs and that liability of an individual PLP is reduced as a result. *See* MONT. CODE ANN. § 75-10-719 (The terms of an administratively or judicially approved settlement "may reduce the potential liability of the other potentially liable persons by the amount of the settlement."); MONT. CODE ANN. § 75-10-724 (recognizing private right of action for PLP to seek contribution); MONT. CODE ANN. § 75-10-742 through 75-10-751 (alternative mechanism for expediting allocation process outside judicial system). DEQ's selective reading of only portions of CECRA runs afoul of basic principles of statutory construction. *See* MONT. CODE ANN. § 1-2-101 (mandating that "[w]here there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all.") A full and fair reading of

CECRA supports the District Court's decision to allow BNSF to present evidence in support of its apportionment defense—albeit evidence that the District Court ultimately deemed insufficient to establish that defense.

2. DEQ's Argument on Appeal is Inconsistent With a Position It Took and Benefited From Before the Trial Court.

There is an inherent inconsistency in DEQ's position on apportionment. On one hand, DEQ advised the District Court that it should consider (and the District Court ultimately did consider) the CALA[4] factors in determining whether a fair amount was "apportioned" to settling parties as part of the various consent decrees, **despite the fact that no CALA petitions were filed by the settling defendants**. *See, e.g.* Dkt. #517.5, Ex. 1, pp. 7-12; Ex. 2, pp. 7-11; Dkt. #544, p. 2. On the other hand, DEQ simultaneously argues that BNSF's failure to file a CALA petition precludes BNSF from seeking apportionment (DEQ Br., p. 26-27), and renders the District Court's decision to allow BNSF to present evidence on apportionment erroneous. DEQ cannot have it both ways. By settling with multiple defendants via consent decrees that apportioned liability without requiring a CALA petition, DEQ is estopped from subsequently asserting that BNSF was not entitled to seek apportionment due to the absence of a CALA petition. *See e.g., Kauffman-Harmon v. Kauffman*, 2001 MT 408, ¶15, 307 Mont. 45, 36 P.3d 408.

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[4] Controlled Allocation of Liability Act ("CALA"), MONT. CODE ANN. §§ 75-10-742 to 752.

3. Public Policy Does Not Support the Result Urged by DEQ.

DEQ initiated its action against a number of potentially responsible parties. In settling with all parties but BNSF (and settling with non-parties Stillwater and Robert Parmenter), DEQ "apportioned" liability and then awarded settling parties contribution protection. Dkt. #94, ¶20 (27.5% share), ¶27 (contribution protection); #144, ¶20 (2% share); ¶28 (contribution protection); #543, ¶21 (assignment of rights under insurance policies only); ¶24 (contribution protection); #274, ¶18 (lump sum payment of $295,000), ¶27 (contribution protection); #542, ¶19 (use of property only, no payment), ¶24 (contribution protection). In several instances, DEQ's apportionment bore no relationship to the share of contamination caused by the settling party. *See e.g.* Dkt. #543, ¶21 (KPTCo only required to assign insurance policies when it was the primary operator); #542 (Mokko apportioned no financial obligation despite its ownership of contaminated property and potential contribution to the contamination). Contrary to the public purpose of encouraging responsible parties to clean up releases of hazardous substances (MONT. CODE ANN. § 75-10-706(b)), DEQ released "responsible parties" KPTCo, Mokko, Stillwater and Parmenter at zero cost. *Id.* Given DEQ's apportionment of liability through settlement (albeit on improper terms), the District Court's decision to allow BNSF to present evidence of apportionment was both equitable and proper.

III. The District Court Properly Denied DEQ's Nuisance Claim.

The District Court's rejection of DEQ's public nuisance claim (Dkt. #588, ¶¶18-19) was correct for three distinct reasons. First, while DEQ acknowledges that the only purpose of its nuisance claim was the recovery of "restoration damages," DEQ did not timely plead for damages and instead simply sought an order of abatement. Second, DEQ failed to establish all elements of a public nuisance claim under MONT. CODE ANN. § 27-30-102. Third, DEQ is improperly attempting to redefine the tort of nuisance so broadly as to effectively replace CECRA and to transform every form of pollution into an actionable public nuisance.

A. DEQ Did Not Properly Seek "Restoration Damages."

DEQ candidly acknowledges that its purpose in appealing the District Court's rejection of its public nuisance claim is to seek damages beyond the relief authorized by CECRA, especially "restoration damages." (DEQ Br., pp. 39-41). DEQ, however, failed to plead restoration damages (or damages of any sort) in its Amended Complaint. *See* Dkt. #6, pp. 2, 10. On the contrary, as the District Court correctly noted in its Order denying DEQ's Motion to Amend Pleading, DEQ affirmatively represented in its discovery responses that it was not seeking damages and instead stated it was seeking only "abatement of the hazardous and

deleterious substances, recovery of its remedial action costs, and statutory penalties." Dkt. #398, p. 4, Ex. A; Dkt. #421, p. 5.

As discussed *supra,* a party cannot recover beyond the relief sought in its complaint, unless the parties have explicitly or implicitly consented to such recovery. *See* M.R.CIV.P. 8(a), 15(b); *Gallatin Trust and Sav. Bank v. Darrah,* 152 Mont. 256, 261, 448 P.2d 734, 737 (1968); *McJunkin v. Kaufman and Broad Home Systems, Inc.*, 229 Mont. 432, 437, 748 P.2d 910, 913 (1987) ("[L]iberal construction and amendment of pleadings does not grant counsel carte blanche to advance new theories on an unsuspecting opponent. . . ."). Here, the parties certainly did not try the issue of restoration damages by consent. DEQ is not allowed to pursue on appeal relief that it failed timely to seek – and, indeed, expressly disavowed – in the District Court.

Notably, on appeal DEQ has **not** challenged the District Court's Order denying DEQ's eleventh-hour Motion to Amend Pleading (Dkt. #421) to add a claim for restoration damages. Regardless, the District Court was within its broad discretion to deny the amendment. *See Emanuel v. Great Falls Sch. Dist.*, 2009 MT 185, ¶8, 351 Mont. 56, 209 P.3d 244; *see also Callan v. Hample*, 73 Mont. 321, 326, 236 P. 550, 551-52 (1925).

B. DEQ's Nuisance Claim Also Fails on the Merits.

In Montana, the tort of nuisance is governed by statute. *See* MONT. CODE ANN. §§ 27-30-101 and 27-30-102. In particular, in order to establish a public nuisance, the alleged nuisance must "affect[], at the same time, an **entire community or neighborhood** or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." MONT. CODE ANN. § 27-30-102(1)(emphasis added). Regardless of whether the alleged public nuisance is described as a "nuisance *per se*" or "nuisance *per accidens*," the burden is still upon the plaintiff—here, DEQ—to prove all the required statutory elements of nuisance.

The District Court correctly held that DEQ failed to carry its burden of proving a public nuisance. In particular, the District Court found that "the Reliance facility contains no residences and is not used by any party for any purpose. . . . While there is some threat to neighboring wells and at least one well has been shut down due to a PCP detection, the Court has received no complaint from any neighbors or from community leaders in Kalispell." Dkt. #588, ¶18. In short, DEQ failed to present evidence showing that the alleged public nuisance "affects, at the same time, an entire community or neighborhood or any considerable number of persons." MONT. CODE ANN. § 27-30-102(1).

In its appeal, despite the District Court's findings, DEQ fails to direct this Court to any evidence in the record showing a tangible "affect" on any specific community, neighborhood or group of people. *See* MONT. CODE ANN. § 27-30-102(1). Indeed, DEQ failed to present evidence of even one Montanan affected by the contamination. Dkt. #588, ¶18.

C. DEQ is Improperly Attempting to Expand the Tort of Nuisance Beyond Its Statutory Basis.

Unable to fulfill the statutory requirements for a public nuisance claim, DEQ instead argues, without regard to the underlying statutory language, that any "pollution that poses an imminent and substantial threat to public health is a public nuisance *per se*." (DEQ Br., p. 34). Despite DEQ's invitation broadly to redefine what constitutes a public nuisance in Montana, this Court remains bound by the Legislature's plain language in MONT. CODE ANN. §§ 27-30-101 and 27-30-102. *See* MONT. CODE ANN. § 1-2-101; *State v. Archambault*, 2007 MT 26, ¶23, 336 Mont. 6, 152 P.3d 698. Nothing in the plain language of Montana's nuisance statute indicates that pollution is a special class of nuisance that per se "affects, at the same time, an entire community or neighborhood or any considerable number of persons." MONT. CODE ANN. § 27-30-102(1). Nor does DEQ cite any Montana case law that has found a public nuisance absent the specific showing required by MONT. CODE ANN. § 27-30-102(1).

Instead, DEQ theorizes that the hypothetical, abstract impact of the pollution on "all Montanans" or "the public" (as distinct from a direct "affect" on specific neighborhoods, communities or groups) is always sufficient to meet the "affect[] [on] . . . any considerable number of persons" requirement of MONT. CODE ANN. § 27-30-102(1). DEQ's argument renders meaningless the public nuisance requirements of MONT. CODE ANN. § 27-30-102, which require DEQ to show an actual affect on a specific neighborhood, community or group of persons. Moreover, by focusing exclusively on the theoretical impact of pollution on "all Montanans" or "the public" instead of the actual impact on specific communities, neighborhoods and groups, DEQ would eliminate any meaningful distinction between a CECRA abatement action under MONT. CODE ANN. § 75-10-711(8) and a claim for public nuisance under MONT. CODE ANN. § 27-30-102(1). If such a conflation was the result the Legislature had intended, it would have simply said so. Instead, the Legislature established CECRA and nuisance as separate statutes with distinct requirements.

DEQ argues that because the Montana Constitution establishes a right to a clean and healthful environment, pollution affects all Montanans without regard to "an individual's ownership of property or even their proximity to a degraded or polluted area." DEQ Br., p. 34. Not surprisingly, DEQ cites no Montana case law

in support of this patently overbroad application of MONT. CODE ANN. §§ 27-30-101 and 27-30-102.

DEQ ignores the statutory elements of a public nuisance claim in favor of broad public policy arguments. Respectfully, such policy questions are for the Legislature, not the courts.

IV. The District Court Did Not Abuse Its Discretion By Allowing Pat Keim to Testify As an Expert.

A. As the Prevailing Party, DEQ's Appeal of an Interlocutory Evidentiary Ruling is Moot.

Despite having prevailed in the District Court and obtained the relief it plead for, DEQ inexplicably challenges one of the District Court's interlocutory evidentiary rulings—the discretionary decision to allow Pat Keim to testify as an expert on behalf of BNSF. DEQ Br., p. 42-46. It is axiomatic that interlocutory rulings—including evidentiary rulings—merge into the trial court's final judgment, and are not subject to appeal unless they materially impact final judgment. Here, the Final Judgment favored DEQ, rendering an appeal by DEQ of an interlocutory evidentiary ruling in favor of BNSF entirely unnecessary and moot. *See In re Marriage of Rush*, 215 Mont. 498, 501, 699 P.2d 65, 67 (1985) (refusing to reach appeal of an interlocutory issue irrelevant to final judgment and holding "[f]ailure to dismiss appellant's modification petition during the trial has no effect on the court's final order; it is simply an interlocutory ruling."); *Weed v. Weed*, 55 Mont.

599, 179 P. 827, 828 (1919) (refusing to hear appeal regarding striking of an affidavit, and reasoning that "[t]he action of the court complained of did not affect the rights of either party. It was nothing more than an interlocutory ruling upon the admissibility of evidence made in the process of determining whether the decree should be modified . . . ."). This Court need not expend its resources reviewing an interlocutory evidentiary ruling that had no impact on the ultimate result.

B. The District Court Did Not Abuse Its Discretion.

Regardless, the District Court was well within its discretion to admit Mr. Keim's expert testimony. "[T]he district court possesses broad discretion in ruling on the admissibility of expert testimony, and without a showing of abuse of discretion, [this Court] will not disturb the district court's ruling on appeal." *Tin Cup County Water and/or Sewer Dist. v. Garden City Plumbing & Heating, Inc.*, 2008 MT 434, ¶46, 347 Mont. 468, 200 P.3d 60 . In the trial court's discretion, expert testimony may be admitted to assist the trier of fact to understand the evidence or to determine a fact in issue. *State v. Damon*, 2005 MT 218, ¶16, 328 Mont. 276, 119 P.3d 1194 . *See also* M. R. Evid. 702.

The District Court did not abuse its discretion by "act[ing] arbitrarily without employment of conscientious judgment" or so far outside "the bounds of reason as to work a substantial injustice." *Tin Cup*, ¶46. Instead, the District Court evaluated Mr. Keim's resume, credentials and work experience, allowed DEQ's

counsel to conduct a *voir dire* examination, and then admitted him as an expert regarding "historical railroad practices relating to the movement of cars—train cars and the loading and unloading of railcars." TR p. 1231, ll. 15-18. In qualifying Mr. Keim as an expert, BNSF presented undisputed evidence the he had spent a lifetime both working on railroads and observing railroad loading and unloading operations. *Id.*, pp. 1206-1231; *see also* M.R.Evid. 702 (expert may be qualified by "knowledge, skill, experience, training or education . . .").

Against the undisputed factual backdrop of Mr. Keim's five decades of railroad experience, the District Court did not abuse its discretion in receiving him as an expert. *Id.*, p. 1236, ll. 12-14).

CONCLUSION TO BNSF'S RESPONSE TO DEQ'S APPEAL

For all the foregoing reasons, and subject to and without waiver of the arguments raised in BNSF's cross-appeal, BNSF respectfully requests that the Court: (1) affirm the District Court's refusal in its Final Unified Order of Abatement to compel compliance with DEQ's post-trial and unreviewed ROD; (2) decline to issue an advisory opinion on the issue of whether apportionment is available under CECRA or, in the alternative, affirm the District Court's holding that apportionment is available under CECRA; (3) affirm the District Court's denial of DEQ's nuisance claim; and (4) affirm that the District Court acted within its discretion by admitting the expert testimony of Mr. Keim.

BNSF'S CROSS-APPEAL

STATEMENT OF ISSUES ON CROSS-APPEAL[5]

I. The District Court erred as a matter of law by holding that BNSF, a common carrier, was jointly and severally liable as an "arranger" for contamination at the Reliance site based on its shipment of petroleum and other useful products to that site.

II. The District Court erred as a matter of law by allowing DEQ simultaneously to pursue both administrative and judicial remedies under CECRA, including issuing an abatement order on the KPT site after the DEQ had already issued a notice letter to BNSF for the same site.

III. The District Court erred by approving the consent decree entered into between DEQ and Montana Mokko, Stillwater Forest Products, and Robert Parmenter, as it did not assign sufficient responsibility to or obtain sufficient compensation from the settling non-parties.

IV. The District Court erred as a matter of law by failing to make any findings or conclusions in the Final Unified Order of Abatement relating to the reduction of BNSF's total percentage of liability by the percentage amounts allocated to settling defendants through consent decree.

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[5] In its Notice of Cross-Appeal, BNSF listed several additional issues for appeal. However, consistent with M. R. APP. P. 12(1)(b), BNSF will limit its Cross-Appeal to four issues, and BNSF therefore drops the issues raised in its Notice of Cross-Appeal but not presented in this brief.

STANDARD OF REVIEW ON CROSS-APPEAL

Three of the issues raised in BNSF's cross-appeal are legal in nature and are reviewed by this Court, without deference to the trial court, "to determine whether those conclusions are correct." *LeFeber*, at ¶19. The remaining issue—the District Court's approval of the consent decree entered into between DEQ and Mokko, Stillwater, and Robert Parmenter—is reviewed for abuse of discretion.

SUMMARY OF ARGUMENT ON CROSS-APPEAL

BNSF's cross-appeal challenges a series of discrete but material legal errors by the District Court in its interpretation and application of CECRA. First, in the wake of the U.S. Supreme Court's landmark decision in *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S.Ct. 1870 (2008), the District Court's imposition of "arranger" liability under CECRA on BNSF was legal error. The Supreme Court reversed the key Ninth Circuit Decision on which the District Court relied in finding BNSF liable as an "arranger." The Supreme Court clarified that "arranger" liability required an **intent** to dispose, yet the record is devoid of any evidence that BNSF **intended to dispose** any of the products it delivered—in its capacity as a common carrier—to the Reliance site. Because CECRA is closely modeled on the federal Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), this Court should adopt the same test for arranger liability as announced by the U.S. Supreme Court. Under this test, BNSF is not an "arranger."

Second, the plain language of CECRA requires DEQ to elect between CECRA's administrative remediation process and a judicial process to obtain an abatement order. The District Court erred, as a matter of law, by allowing DEQ to simultaneously pursue *both* administrative remediation and judicial abatement.

Third, the District Court erred by approving the consent decree entered into between DEQ and Mokko, Stillwater, and Robert Parmenter. There was no rational basis for the DEQ's determination that this consent decree was fair and reasonable and in the public's interest, as it did not assign sufficient responsibility to or obtain adequate compensation from the settling parties.

Fourth, the fact that BNSF was held jointly and severally liable does not alter the fact that BNSF is nonetheless entitled to an offset or credit that reflects the court-approved consent decrees—entered into by the various settling parties. The District Court erred as a matter of law by failing to include any provision reducing or offsetting BNSF's liability to reflect the consent decree settlements. This omission potentially affords DEQ the opportunity to recover twice for the same injury—an improper windfall.

ARGUMENT ON CROSS-APPEAL

I. The District Court Erred By Holding BNSF Liable As an "Arranger."

In holding BNSF "liable" as an arranger, the District Court relied exclusively on a broad interpretation of arranger liability under CERCLA adopted

by the Ninth Circuit. However, three months after the District Court issued its order on Reliance, the U.S. Supreme Court invalidated the Ninth Circuit's broad interpretation of arranger liability. BNSF timely petitioned the District Court to reconsider its determination on "arranger" liability in light of the U.S. Supreme Court, but the District Court declined to do so. Dkt. #594; 612. Because neither the facts nor the law support BNSF's liability as an "arranger," the District Court's findings and its denial of BNSF's reconsideration request must be reversed. Upholding the District Court's version of arranger liability under CECRA will have serious consequences for **all** common carriers in Montana.

A. The District Court Relied on a Definition of "Arranger" Liability that has Been Rejected by the U.S. Supreme Court.

1. "Arranger" Liability Under CECRA is Indistinguishable From "Arranger" Liability Under CERCLA.

In addition to imposing liability on owners and operators of facilities from which a hazardous substance was released, CECRA imposes liability on "a person who **generated, possessed**, or **was otherwise responsible** for a hazardous or deleterious substance and **who, by contract, agreement or otherwise, arranged** for disposal or treatment of the substance. . . ." MONT. CODE ANN. § 75-10-715(1)(c) (emphasis added). Similarly, CERCLA imposes liability on "any person who by contract, agreement, or otherwise **arranged for** disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous

substances." 42 U.S.C. § 9607(a)(3) (emphasis added). Neither the state nor the federal statute defines the term "arranged."

The Montana Legislature modeled CECRA after CERCLA and borrowed many provisions and terms directly from the federal statute. *See* Montana Legislature's Statement of Intent, Ch. 490, L. 1995. Because the "arranger" liability provisions of CECRA and CERCLA are functionally identical, case law interpreting CERCLA should also be applied in interpreting CECRA.

2. In Finding BNSF Liable as an "Arranger," the District Court Relied on CERCLA Case Law.

Consistent with this understanding of the relationship between CECRA and CERCLA, DEQ urged the District Court to apply cases interpreting CERCLA to determine BNSF's liability under CECRA, including BNSF's potential liability as an "arranger." Dkt. #580 pp. 9, 14, 15, 17, 18. The District Court adopted DEQ's argument, applying a virtually unbounded interpretation of "arranger" liability under CERCLA drawn exclusively from the Ninth Circuit's holding in *United States v. Burlington N. & Santa Fe Ry. Co*, 520 F.3d 918 (2008), and found BNSF "jointly and severally liable for the releases and threatened releases [at Reliance] . . . since it **possessed** a hazardous or deleterious substance and **arranged for** disposal or treatment of the substance." Dkt. #588, p. 21, ¶10 (emphasis added). According to the court, arranger liability arose merely from

"the **involvement of BNSF** in the dumping of petroleum products on the surface of the ground located at what has been denominated the Y area between the railroad tracks." *Id* (emphasis added).[6]

The District Court simply cited the Ninth Circuit's declaration of a "broader type of arranger liability" as support for its conclusions:

> 3. The Court notes that the Ninth Circuit Court has found direct arranger liability where the central purpose of the transaction is disposal of hazardous waste. United States v. BNSF, at 948. There is also a broader type of arranger liability, where disposal is part of, but not the focus of the transaction. . . . The Court also notes that a disposal of a hazardous substance also includes its discharge, spilling, dumping, or leaking into the environment. Id., at 949. Thus, to the extent that BNSF spotted railcars to the Y area and allowed the petroleum products to be dumped onto the ground, the Court finds that BNSF was an arranger with strict liability as provided above.

Dkt. #588, pp. 20-21 (emphasis added).

The Ninth Circuit case upon which the District Court relied involved an agricultural chemical storage facility where spills of pesticide products had resulted in the contamination. *United States v. BNSF.*, 520 F.3d at 930. Some of the pesticides were manufactured by Shell and transported to owner/operator Brown & Bryant via common carriers. *Id.* Leaks and spills had occurred when the

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[6] The court found that BNSF had merely positioned tank cars near the Y area, which was used by Reliance Refinery employees for storage of crude oil. *Id.*, pp. 12-13, ¶¶52, 53.

products were transferred at delivery from the common carriers to onsite bulk storage tanks, and then subsequently to other locations. *Id.* at 931.[7]

The Ninth Circuit affirmed Shell's liability for having "arranged for" the disposal of the pesticides through its sale and delivery of pesticide products to Brown & Bryant. *Id.*

The District Court viewed the Ninth Circuit's "broader category" of arranger liability as extending even to common carrier intermediaries—such as BNSF—in sales of useful products, regardless of the manner of common carriers' "possession" of the products or the details of their "arrangement."

Less than three months after the District Court issued its decision, the Supreme Court reversed the Ninth Circuit—expressly rejecting the "broader version" of arranger liability and invalidating the findings relied on by the District Court in the instant case. *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S.Ct. 1870 (2009) (hereinafter "*BNSF v. United States*"). In the wake of the Supreme Court's decision, the District Court's holding on "arranger" liability must be reversed. *See Haines Pipeline v. MPC*, 251 Mont. 422, 433, 830 P.2d 1230, 1238 (1991).

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[7] Notably, despite the common carriers' apparent involvement in offloading the pesticides, there is no mention of holding them liable as arrangers. *See id.* at 932.

B. Under U.S. Supreme Court Precedent, a Party Must Have Intended for Disposal to Occur to be an "Arranger."

In *BNSF v. United States*, the U.S. Supreme Court defined the standard for imposing arranger liability under CERCLA. The Supreme Court rejected the "broader category" of arranger liability holding that a defendant must have **intended** for disposal to occur as part of the transaction constituting the arrangement. *BNSF v. United States*, 129 S.Ct. at 1879-1880. Moreover, **mere knowledge** that spills and leaks would occur was not sufficient evidence of intent. *Id.*

The Supreme Court explained that an entity would self-evidently be liable as an arranger if it "were to enter into a transaction for the **sole purpose** of discarding a used and useful hazardous substance," but "could not be held liable as an arranger merely for selling a new and useful product if the purchaser of that product later, and unbeknownst to the seller, disposed of the product in a way that led to contamination." *Id.* at 1878.

Cases falling between these two extremes require a more fact-intensive inquiry that looks beyond the parties' characterization of the transaction, but liability **must not extend beyond the limits of the statute**. *Id.* at 1879. In the absence of a statutory definition for the term "arranged for," the Court looked to the term's ordinary meaning, which it said "implies action **directed** at a specific purpose." *Id.* (emphasis added). An entity may therefore qualify as an arranger

BNSF's employees unloaded the railcars, or otherwise emptied the products into the ditches or exercised control over Reliance Refinery's storage decisions. Instead, the District Court found that because BNSF had merely "allowed" Reliance Refinery employees to do so, BNSF could be held liable as an arranger. *Id.* p. 21, ¶12.

Indeed, other than a reference to evidence of two instances where BNSF's predecessors may have delivered leaking railcars into the Reliance site (with no proof that these instances were anything more than accidents) (*id.* p. 9, ¶39; p. 12, ¶53), the District Court found that the actual "disposal" of hazardous substances was the responsibility of Reliance Refinery employees. *Id.* p. 12-13, ¶53. BNSF's only "involvement" in the disposal was its transporting and spotting of railcars containing products to the Reliance Refinery, and its imputed **knowledge** that Reliance Refinery employees would unload the products in earthen-diked pools at the Y area. *Id*; *see* Dkt. #568, pp. 1243-1244.

Just as the Ninth Circuit did with Shell, the District Court wrongly interpreted arranger liability as extending to those with mere knowledge of "discharge, spilling, dumping or leaking" even where disposal was "not the focus of the transaction." *See* Dkt. #588, p. 21, ¶12. This same reasoning was explicitly rejected by the Supreme Court: "While it is true that in some instances an entity's knowledge that its product will be leaked, spilled, dumped, or otherwise discarded

may provide evidence of the entity's intent to dispose of its hazardous wastes, **knowledge alone is insufficient to prove that an entity 'planned for' the disposal**[.]" *BNSF v. United States,* 129 S.Ct. at 1880 (emphasis added).

Here, the facts do not support a conclusion that BNSF entered into a transaction "**with the intention** that at least a portion of the product **be disposed** of." *BNSF v. United States*, 129 S.Ct. at 1880. Nor did the District Court make any such finding. BNSF's mere knowledge that Reliance Refinery employees would store the products in pools at the Y area is "insufficient to prove that it 'planned for' the disposal." *Id.*

BNSF is even further removed from the disposal than was Shell in *BNSF v. United States*. BNSF was merely an intermediary common carrier transporting an unused useful product between the seller and the purchaser, Reliance Refinery. BNSF never owned the useful products, nor did it "arrange" to do anything other than transport them. Under federal law, common carriers such as BNSF are **statutorily required** to provide rail transportation in response to a reasonable request. *See* 49 U.S.C. § 11101(a). BNSF's only **intent** was to comply with federal law and fulfill its role as a common carrier by transporting the unused useful petroleum products from seller to purchaser.

DEQ presented **no evidence**, and the District Court made **no findings**, that BNSF intended to provide rail transportation to Reliance so that the products could

be disposed. Nor was there any evidence that BNSF ever legally "possessed" (owned or controlled) the products.[8] As the District Court's findings confirm, the product was delivered to Reliance with the sole purpose of being used and stored as part of Reliance's operations, and thereby refined into further useful products. *Id.* p. 12-13, ¶53 p. 8, ¶34. The fact that unloading resulted in some accidental spills, or that Reliance chose to store some of the delivered product in a careless manner does not establish that BNSF had the requisite **intent** to dispose of the product it transported.

D. Application of Arranger Liability to a Common Carrier is Unprecedented Under CERCLA.

No federal court has ever imposed CERCLA "arranger" liability on a common carrier—such as BNSF—for merely having transported a hazardous material to a contaminated site. Yet that is all that BNSF did here. Notably, even in the Ninth Circuit's now-rejected *United States v. BNSF* holding, there was no imposition of arranger liability on BNSF (or any other common carrier) for having transported the pesticides to the Brown & Bryant facility. *See United States v. BNSF*, 520 F.3d at 931. Yet, just as in this case, it was demonstrated that the pesticides were leaked and spilled during off-loading from railcars at the Brown & Bryant facility. *Id.*

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[8] Indeed, evidence showed that even the tank cars used to transport the products would have been owned or leased by entities other than BNSF. *See* TR, pp. 1244, ll. 24-1245, ll. 13.

Even before the Supreme Court held that an "arranger" must have intended to dispose, courts had refused to impose liability on entities engaged only in the transportation of hazardous substances. For instance, in *United States v. Western Processing Company*, 756 F.Supp. 1416 (W.D. Wash. 1991), the federal district court held that § 9607(a)(3) (CERCLA's "arranger" provision) was not applicable to common carrier trucking companies that transported various processing wastes generated by others to a contaminated site. The court concluded that CERCLA's express provision for liability of transporters in § 9607(a)(4) indicated that transporters could not also be held liable as arrangers under § 9607(a)(3). *Id.* at 1421. The court further recognized that "[t]ransporters have a limited role in the activity surrounding hazardous substances. They neither create nor treat the material, but are responsible for its safe carriage between the point where it is generated and where it is left for disposal or treatment." *Id.* at 1420. "Section 107(a)(3) [42 U.S.C. § 9607(a)(3)] **is not a CERCLA provision under which transporters may be liable**." *Id.* at 1421(emphasis added). See *also, United States v. Conrail*, 729 F. Supp. 1461, 1472-73 (1990, D.Del) (refusing to impose arranger liability on a barge company that that had transported waste oil to a contaminated site for disposal); *ACC Chem. Co. v. Halliburton Co.,* 932 F. Supp. 233 (S.D. Iowa 1995) (holding that the owner of a truck from which perchloroethylene was pumped at manufacturing site could not be held liable as an

arranger); *United States v. Davis,* 1 F.Supp.2d 125, 131 (1995 D. R.I.) (holding that company that transported waste to disposal site from which it was later taken to contaminated site, was not liable as an "arranger").

CECRA has a "transporter" provision nearly identical to that in CERCLA. MONT. CODE ANN. § 75-10-715(1)(d); *comp.* 42 U.S.C. § 9607(a)(4) ("any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities . . . shall be liable"). Here, the District Court found that BNSF was **not** liable as a transporter. Dkt. #588, p. 21, ¶12. That CECRA includes an express transporter provision indicates that the "arranger" provision was not meant to be applied to defendants (particularly common carriers) based solely on their transportation of hazardous or deleterious substances.

E. Upholding the Broad Version of Arranger Liability Would Have Consequences for All Common Carriers in Montana.

Under the District Court's broad version of arranger liability, any common carrier transporting hazardous wastes—including hazardous useful products—in Montana could be held liable as an arranger under CECRA if there are inadvertent spills during delivery. Under the District Court's reasoning, a Montana common carrier could also be liable as an arranger if the customers to whom it delivers useful products improperly dispose of them. The District Court's "catch-all" version of arranger liability would potentially impose liability on any trucking company, railroad or airline doing legitimate business in Montana. The economic

affect of such unfettered arranger liability would not only impact common carriers operating in Montana, but also all the Montana businesses that rely on common carriers for the delivery of their products—whether or not those products contain hazardous substances. Imposing arranger liability on common carriers who lacked any intent to dispose will result in higher shipment and delivery costs for all Montanans, as common carriers are forced to charge higher fees to offset the risk of unexpected arranger liability. In sum, if the District Court's expansive version of arranger liability is allowed to stand and common carriers are held liable for the acts of their customers, then the costs of doing business in Montana will increase and some common carriers could limit their operations in the state.

II. The District Court Erred By Allowing DEQ to Simultaneously Pursue Both Administrative and Judicial Remedies Under CECRA.

Prior to filing this action in the District Court, DEQ commenced administrative proceedings under CECRA, MONT. CODE ANN. § 75-10-711, by sending two separate notice letters to BNSF. TR, pp. 277:25-283:20; TR, pp. 88, 90 (Plaintiff's Exhibits 13, 14). The letters notified BNSF of its potential liability under CECRA for the Reliance Site. *Id.* The letters, however, did not require any specific actions from BNSF. *Id.* Nonetheless, from the beginning, BNSF has consistently indicated that it is ready, willing and able to abate the site.

CECRA provides that DEQ may issue notice letters such as those sent to BNSF as the initial step in requiring parties perform a remedial action. MONT.

CODE ANN. § 75-10-711(1). The notification process invokes CECRA's administrative remediation process. Through that process, if DEQ requests a party "take appropriate remedial action but [the party is] unable or unwilling to take action in a timely manner," then DEQ may use its own funds to perform the remediation and then seek reimbursement from the party. MONT. CODE ANN. § 75-10-711(1), (3).

CECRA also allows DEQ to bring litigation as an **alternative** to the administrative remediation process: "**Instead** of issuing a notification or an order under this section, [DEQ] **may bring an action for legal or equitable relief** . . . as may be necessary **to abate** any imminent and substantial endangerment to the public health, safety, or welfare or the environment resulting from the release . . . ." MONT. CODE ANN. § 75-10-711(8) (emphasis added). In other words, Section 711(8) allows DEQ to select between seeking judicial abatement order or, "instead," providing notice and accomplishing remediation through the separate administrative process. *Id.*

The plain language of Section 711(8) does not authorize DEQ to use these alternative procedures simultaneously. But that is precisely what DEQ requested here, and what the District Court permitted when it issued an abatement order.

The Montana legislature provided that DEQ may seek a judicial abatement order "**instead of**" issuing notifications and orders. MONT. CODE ANN. § 75-10-

711(8). "Instead of" is a preposition, the plain meaning of which is: "as a substitute for or alternative to." *Webster's Third Int'l Dictionary of the English Language Unabridged* 1171 (1986). There is no ambiguity as to the operative language: a judicial abatement order is only available as "a substitute for or alternative to" the administrative remediation process. The District Court's issuance of an abatement order effectively changes the plain language from "instead of" to "in addition to." The courts should not modify, omit or add language to a statute.

Moreover, a judicial abatement order is only available under the administrative process where DEQ has requested a party to abate a site, and the party refuses to do so. MONT. CODE ANN. § 75-10-711(3), (5). That is not the case here, as BNSF has consistently expressed that it is ready, willing and able to abate.

III. The District Court Erred by Approving the Consent Decree Entered Into with Mokko, Stillwater, and Parmenter.

DEQ entered into a consent decree with Defendant Mokko and non-parties Stillwater and Parmenter. Dkt. #542. Despite noticing Montana Mokko, Inc. as a potentially liable party ("PLP") and acknowledging Stillwater Forest Products, Inc.'s and Robert Parmenter's statutory liability under CECRA, DEQ **did not apportion any share** of liability to these PLPs. *See* Dkt. #542, ¶14 (recognizing that both Mokko and Stillwater are current property owners and operators); 517.5, Ex. 1, p. 4 (Parameter was a past owner of the property). Nonetheless, according

to DEQ its case against Mokko was "solid." Dkt. #517.5, p. 8. Instead of holding these responsible parties accountable (and thereby reducing BNSF's proportionate share of liability), DEQ released any claims against these entities, in exchange for no compensation for past or future remedial costs, and protection from contribution claims. Dkt. #542, ¶19. Despite the lack of any tangible public benefit in this consent decree, it was approved by the District Court. Dkt. #544. Under these facts, the District Court abused its discretion by approving the consent decree.

There was no rational basis for DEQ's determination that the consent decree with Mokko, Stillwater, and Parmenter was fair and reasonable and in the public's interest, as it did not assign **any** responsibility to or obtain **any** monetary compensation from these responsible parties. *See* Dkt. #542, ¶19. DEQ's decision to enter into this consequence-free consent decree was especially alarming given that its own investigation uncovered environmental conditions on these parties' property which were unrelated to the operations of KPT (for which DEQ held BNSF liable).[9] *See* Dkt. #517.5, Ex. 2, p. 9. By statute, DEQ was required to take "into account the toxicity of the hazardous or deleterious substances involved and the person's contribution of hazardous or deleterious substances in relation to the total volume of hazardous or deleterious substances at the facility." MONT. CODE

[9] MONT. CODE ANN. § 75-10-723 does not apply here where the consent decree did not require the performance of "a remedial action."

ANN. § 75-10-719(4). But the administrative record is devoid of toxicity data about the sawdust and any associated contaminated soil or groundwater. *See* Dkt. #517.5, Ex. 2, p. 9. DEQ was also required to show that any of the conditions in Section 719(4)(a) through (4)(d) were met, which they wholly failed to do. DEQ, for its part, claims it is not bound by those statutory provisions. *Id.,* p. 12. Instead, DEQ argued below that MONT. CODE ANN. § 75-10-719(4) has "no relevance to this CD nor to DEQ's ability to settle with Mokko, Parmenter or Stillwater and offer contribution protection. . . ." *Id.* DEQ and the trial court alternatively applied the CALA apportionment factors purportedly to allocate liability to the settling parties (although no share of liability was allocated to acknowledged responsible parties Mokko, Parmenter, or Stillwater). Dkt. #517.5, Ex. 2, pp. 7-12; Dkt. #544, p. 2. Mokko, Parmenter, and Stillwater did not file a CALA petition. Given the inapplicability of MONT. CODE ANN. § 75-10-723 and DEQ's acknowledged failure to comply with MONT. CODE ANN. § 75-10-719(4), there was no statutory basis for approving the Mokko, Parmenter, and Stillwater Consent Decree.

Further, the Consent Decree fails because DEQ elected not to disclose the full "administrative record" that supported its approval decision. *See* Dkt. #517.5, Ex. 2 (summary to public comments received). DEQ instead offered its unsupported assurance that it was acting appropriately by entering into the Mokko,

Parmenter, and Stillwater Consent Decree. Dkt. #517.5, pp. 4-5, Ex. 2, p. 1. DEQ's negotiations took place behind closed doors, without BNSF's or other affected parties' involvement. DEQ based its decision on documents (including financial records) that DEQ reviewed, but did not disclose for either public review or the District Court's consideration. *See* #517.5, Ex. 2, pp. 6, 8 ("DEQ's understanding, from its own investigation...is that they lack assets and that the companies are no longer operating"). DEQ's assurances are insufficient to satisfy its statutory obligations. *See Owens v. Montana Dep't of Revenue,* 2006 MT 36, ¶¶13-17, 331 Mont. 166, 130 P.3d 1256 (dismissing without prejudice for party's and court's failure to obtain and review entire administrative record); *United States v. Montrose Chemical Corp.,* 50 F.3d 741, 747 (9th Cir. 1995) (consent decree rejected because information not sufficient to determine if fair, reasonable or in the public interest). Although, judicial review of a consent decree is deferential, a court is not to "rubber stamp" an agency's proposed consent decree, and cannot turn "a blind eye to an empty record on a critical aspect of settlement evaluation." *Montrose,* 50 F.3d at 748. Where a consent decree affects the interests of the public or of third parties (such as BNSF), this Court has a "heightened responsibility" to protect the interests of the public and of third parties. *See United States v. Oregon,* 913 F.2d 576, 580 (9th Cir. 1990). As DEQ itself acknowledges,

> [s]ubstantive fairness requires that a settling party roughly bear the cost of the harm for which it is legally responsible. To ensure substantive fairness, settlement terms should be based upon, and roughly correlated with, some acceptable measure of comparative fault, apportioning liability among the settling parties according to rational (if necessarily imprecise) estimates of how much harm each liable person has done.

Dkt. #517.5, p. 9. Because it released three PLPs without obtaining **any** relief, DEQ's Consent Decree with Mokko, Stillwater, and Parmenter fails this simple test. The District Court's order approving that Consent Decree should be vacated.

IV. The District Court Erred By Failing to Make Any Findings Related to the Reduction of BNSF's Liability By the Amounts Allocated to Settling Defendants.

DEQ also entered into consent decrees with several other PLPs allocating them 29.5% of the liability for the KRY remediation. *See* Dkt. #94 (DNRC); #144 (Swank); #543 (KPTCo); #274 (Exxon). The District Court erred by denying BNSF the benefit of those settlements. While MONT. CODE ANN. § 75-10-715(1) imposes joint and several liability on parties found liable under CECRA. The amount of such liability is subject to reduction by settlements with other PLPs. MONT. CODE ANN. § 75-10-719(1) provides that "[t]he terms of the settlement may reduce the potential liability of the other potentially liable persons by the amount of the settlement." Offsetting the amount of the settlements entered into by settling parties against the joint and several liability of non-settling potentially liable

parties, such as BNSF is equitable and just and prevents DEQ from realizing a windfall.

Montana law generally prohibits windfall damages and double recoveries. *See, e.g.,* MONT. CODE ANN. 27-1-303 ("A person may not recover a greater amount in damages for the breach of an obligation than the person could have gained by the full performance of the obligation on both sides unless a greater recovery is specified by statute."); *Newbury v. State Farm Fire & Cas. Ins. Co. of Bloomington, Ill.*, 2008 MT 156, ¶47, 343 Mont. 279, 184 P.3d 1021 ("To allow Newbury to receive in excess of the total amount of his medical expenses would result in a windfall to Newbury."). Nothing in CECRA indicates that the Legislature intended to permit DEQ to pursue windfalls by settling with some responsible parties, while still recovering the full amount of remediation costs from any jointly and severally liable non-settling defendants. On the contrary, consistent with the Montana law's aversion to double recoveries, MONT. CODE ANN. § 75-10-719(1) reduces the potential liability of non-settling defendants "by the amount of the settlement" entered into by DEQ and other responsible parties.

BNSF's potential liability at most should have extended only to those categories of costs/damages remaining after DEQ's court-approved settlement with other responsible parties. In this case, DEQ settled with DNRC and Swank, together resolving 29.5% of the total potential liability attributable to any party.

See Dkt. #94, ¶20 (27.5% DNRC), #144, ¶20 (2% Swank). Although DEQ represented, in response to BNSF's public comments, that these settlements would lessen BNSF's total potential liability, the District Court's final order did not reduce BNSF's share by these amounts. *Compare* Dkt. #193, p. 8 (District Court's prior order noting that BNSF's total potential liability is reduced almost 30 percent as a result of the settlements); #164, Ex. A, p. 19 (DEQ's representation that its settlement with DNRC and Swank was "actually in [BNSF's] interest because its liability may be reduced from 100% to 72.5% (reduced again, of course, by Swank's settlement for 2% and further reduced by the settlement of any of the other defendants.") with Dkt. #588 (FF&CC containing no such reduction for BNSF). Likewise, MONT. CODE ANN. § 75-10-719 provides a mechanism for the reduction of BNSF's liability "by the amount of the settlement." To the extent joint and several liability is upheld against BNSF, BNSF can nonetheless only be held jointly and severally liable for 70.5% of the total potential liability that remained following DEQ's voluntary settlements with DNRC and Swank.

In addition, BNSF's total potential liability should also, as a matter of law, be reduced by the $1.25 million specifically appropriated by the Legislature to the evaluation and remediation of the KRY site, which cannot be recovered from BNSF under MONT. CODE ANN. § 75-10-743(9)(a) ("The department may not seek recovery of the $1.25 million from potentially liable persons."). Accordingly, as

with the settlement proceeds received by DEQ, BNSF's total liability should be reduced to reflect DEQ's receipt of these funds, which DEQ "may not seek recovery of . . . from potentially liable persons." *Id.*

CONCLUSION TO BNSF'S CROSS-APPEAL

For all the foregoing reasons, BNSF respectfully requests that the Court: (1) reverse the District Court's holding that BNSF was liable as an "arranger" under CECRA; (2) reverse the District Court's decision to allow DEQ to simultaneously pursue both administrative remediation and a judicial abatement order, and remand for an election of remedies by DEQ; (3) reverse the District Court's approval of the DEQ's Consent Decree with Mokko, Stillwater, and Parmenter; and (4) reverse and remand for the entry of an order reducing BNSF's total percentage of liability by the percentage amounts allocated to settling parties.

Respectfully submitted this 17th day of May, 2010.

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The undersigned counsel certifies that a copy of the foregoing Appellees' Response Brief and Cross-Appeal was mailed by first-class mail, postage prepaid, addressed as follows to the following counsel on May 17, 2010.

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Montana Rule of Appellate Procedure 11(4)(d), that Appellee's foregoing Answer Brief and Cross-Appeal is printed with proportionately-spaced Times New Roman text typeface of 14 points, is double spaced, and the word count, calculated by Microsoft Word 2003 is 12,437, excluding the Certificate of Compliance and the Certificate of Service.

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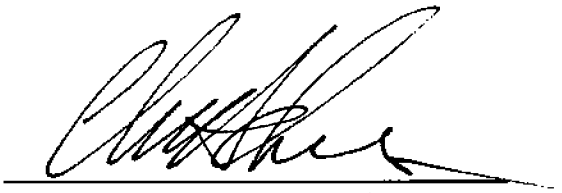

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